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AIDILADHA SULAIMAN v. MAHKAMAH PERUSAHAAN MALAYSIA & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
MOHD NAZLAN GHAZALI JC
[JUDICIAL REVIEW NO: 25-28-07-2014]
B 20 SEPTEMBER 2015

ADMINISTRATIVE LAW: *Judicial review – High Court – Certiorari – Findings of Industrial Court – Failure of Industrial Court to properly consider totality of evidence and relevant facts – Whether decision reasonable – Whether Industrial*
C *Court committed errors of law warranting intervention*

EMPLOYMENT: *Contract of employment – Misconduct – Demotion of employee – Whether reduction in position must not be lower than from which employee was last promoted*

D ***LABOUR LAW:*** *Employment – Constructive dismissal – Demotion of employee – Employee received cash as token of appreciation for what was supposed to be free event – Issuance of unofficial receipt – Absence of policy guidelines on issuance of receipts – Whether employee's acts amounted to misconduct – Whether punishment of demotion proportionate to misconduct*

E On 28 April 2009, the applicant conducted a safety talk at a company known as Oriental Sheet Piling ('company'), on behalf of the second respondent, free of charge. The company however, on its own accord, gave to the applicant cash in the amount of RM400 and requested that a receipt be issued for its record ('the said receipt'). The applicant acceded and caused an unofficial
F receipt be issued for this purpose. Subsequently, the applicant was found guilty, by the domestic inquiry panel, for a charge of having issued the said receipt which was not in adherence to the financial procedures of the second respondent. As such, the second respondent's disciplinary committee, following its deliberations, arrived at the decision to mete out the
G punishment against the applicant. The applicant who was a Manager and at Job Grade 16 prior to the punishment, was re-designated and demoted in position to that of an Executive at Job Grade 15. The applicant's attempt to challenge the decision of the second respondent at the Industrial Court was unsuccessful. Central to the reasoning made apparent in the award was that whilst the safety talk might be performed free of charge, an impression might
H have been given that payment may nevertheless be required or accepted. According to the award, the second respondent was entitled to expect that an employee of the applicant's seniority would not have issued a receipt in the manner that was done. Dissatisfied with the decision, the applicant instituted these judicial review proceedings for an order of *certiorari* to quash
I the award on the grounds, *inter alia*, that: (i) the first respondent had taken into account irrelevant considerations in arriving at its decision; (ii) the

demotion was against the law as it involved a reduction in more than one job grades; and (iii) the first respondent failed to give sufficient judicial appreciation on the absence of policy guidelines on the issuance of receipts.

Held (allowing judicial review and an order of *certiorari* with costs):

(1) There were no guidelines or policies governing the treatment of gifts and payments received for the conduct of safety talk by employees of the second respondent at the material time. It would be most inequitable as well as being an affront to every established principles and rule of law for anyone to be faulted for a violation of a requirement which was non-existent at the material point in time. The punishment of demotion would not have been proportionate to the misconduct if the absence of any policy guidelines on which the issuance of the unofficial receipt had been given sufficient judicial appreciation. (paras 19 & 20)

(2) The second respondent's finding that the punishment commensurated with the misconduct primarily because the issuance of the receipt gave the impression as stated in the award can be considered to be a reference to an irrelevant consideration. In the instant case, the client themselves asked for the receipt and there was no basis to suggest that they were under the misapprehension that payment was required or expected simply because a receipt was requested from the applicant. Considering the amount, it was very likely that the company decided to make payment on their own accord as a gesture of appreciation. The act of requesting a receipt for purposes of internal financial management, cannot be equated with the perceived concern that an impression had been given that the event was not for free on account of the payment of RM400. (paras 22 & 23)

(3) The aspect of the issuance of the receipt cannot be considered in isolation without taking into account the surrounding circumstances and underlying reasons. And if these had been properly evaluated, the finding of the first respondent on the appropriateness of the punishment of demotion would have been arrived at differently. (para 23)

(4) There was insufficient judicial appreciation of the totality of evidence by the first respondent, as reflected in the award. When making the award, the first respondent took irrelevant matters into considerations such as the supposed perception by the company of the event being chargeable by the second respondent, and failed to sufficiently take into account relevant considerations such as token gifts and payments to presenters being a generally accepted practice, and in the first place not strictly prohibited by the second respondent's internal policies and rules during the material time. (para 24)

(5) The applicant's contention that there were in fact three types of punishment meted out against him was not without basis. First there was the demotion from manager to executive. Secondly, the reduction in grade *ie*, from grade 16 to 15. Thirdly, a reduction in salary from RM4,989.76 to RM4,723.96. Based on industrial relations jurisprudence, such form of punishment is harsh, excessive and unlawful. This aspect of the imposition of punishment which is erroneous in law was not mentioned in the award of the first respondent given its focus on demotion only. (para 27)

(6) The award did not consider the principle of law that the reduction in position must not be lower than from which the employee was last promoted. When the second respondent meted out the punishment, the applicant was reverted to the position which the applicant held when he first commenced employment, disregarding the fact that he had subsequently since joining, been promoted to the position of a Senior Executive prior to being made a Manager. Further, the award offends the rule that an employee can only lawfully be demoted to a rank within the same category of service. A demotion from the position of a Manager to an Executive therefore tantamount to an error of law. (para 31)

(7) The reduction to the position of an executive placed the applicant equal to five other executives at the material time. Yet he was instructed to continue performing the managerial duties despite the demotion, and expected to continue to command the respect of the rest. This tantamount to a form of an unfair labour practice and the fact that his demotion must have been known to others, amounted to untold embarrassment. (para 32)

(8) The award of the first respondent had been tainted with illegality in the *Wednesbury* unreasonableness sense whereby the first respondent had failed to take into account relevant considerations. The relevant considerations in the instant case such as the seriousness of the misconduct in the absence of relevant governing policy, the nature of the disciplinary action involving three forms of punishments, the very legality of demotion as a punishment, the 'double demotion' as well as a demotion to a position different from the applicant's category of service as a Manager also constitute errors of law that could and should attract supervisory intervention in the form of a judicial review. (paras 34 & 35)

(9) The first respondent had fallen into an error of law in having taken the approach it did in arriving at the decision. The decision further offended the rule on proportionality. Justice, equity and fair play demand that punishment must always be commensurate with the gravity of the offences charged. The applicant had successfully proven its claim, on a

balance of probabilities, that the second respondent had breached the very foundation of the contract of employment with the applicant, which justified the latter leaving employment. The award could thus be characterised as one which is contrary to the overriding conceptual jurisprudence of industrial relations law which promotes the doctrine of equity, good conscience and substantial merits of the case, in adherence to s. 30(5) of the Industrial Relations Act 1967. (paras 36 & 37)

Case(s) referred to:

Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh [2000] 4 CLJ 77 CA ***(refd)***

Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 CA ***(refd)***

Bromley London Borough Council v. Greater London Council & Anor [1983] 1 AC 768 ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor [2001] 3 CLJ 541 FC ***(refd)***

Ganesh Chandra Das v. South Bengal State Transport Corporation 1993 Lab 1C 2574 [2576] (Cal): 1994 (68) FIR 707 ***(refd)***

Handyside v. UK, Series A, No. 24 [1976] 1 EHRR 737 ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Hotel Malaya Sdn Bhd & Anor v. National Union of Hotel, Bar & Restaurant Workers & Anor [1982] CLJ 460; [1982] CLJ (Rep) 124 FC ***(refd)***

Hussain Sasansaheb Kaladgi v. State of Maharashtra (AIR 1987 Supreme Court 1627 - Civil Appeal No 835 of 1973) ***(refd)***

Pencantuman Pekerja-Pekerja Tenaga Nasional Bhd v. Tenaga Nasional Bhd [2013] 1 ILR 221 ***(refd)***

Malaysia Airline System Bhd v. Wan Sa'adi Wan Mustafa [2015] 1 CLJ 295 FC ***(refd)***

MEC Forwarding System Sdn Bhd v. Ramachandran G. Krishnan [2007] 1 ILR 71 ***(refd)***

Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

Nippon Paint (M) Sdn Bhd v. Abd Rahim Md Ibrahim [2008] 2 LNS 0654 ***(refd)***

Norizan Bakar v. Panzana Enterprise Sdn Bhd [2013] 9 CLJ 409 FC ***(foll)***

Nyadar Singh v. Union of India & others (AIR 1988 Supreme Court 1979 - Civil Appeal No 3003 of 1988) ***(refd)***

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Rama Kant Misra v. State of Uttar Pradesh 1982 Lab 1C 1970, 1792 SC ***(refd)***

South East Asia Fire Bricks Sdn Bhd v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors [1980] 1 LNS 71 PC ***(refd)***

Syarikat Permodalan Kebangsaan Bhd v. Mohamed Johari Abdul Rahman [2004] 2 ILR 803 ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Western Excavating (EEC) Ltd v. Sharp [1978] 1 All ER 713 ***(refd)***

Wong Chee Hong v. Cathay Organisation (Malaysia) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20(3), 30(5)
Rules of Court 2012, O. 53 r. 3(2)

Other source(s) referred to:
Halsbury's Laws of Malaysia, vol 9 para [160.076]

For the applicant - Jeevaretnam (J Shamesh with him); M/s Jeevaretnam & Co
For the 2nd respondent - Pang Soon Mun; M/s Ramadass & Assocs

Reported by Sandra Gabriel

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This is an application for judicial review by the applicant for an order of *certiorari* to quash the award of the Industrial Court (Award No. 492 of 2014) ("the Award") dated 8 April 2014 (following the reference by the Minister of Human Resources on 9 August 2012 under s. 20(3) of the Industrial Relations Act 1967) granted by the first respondent, which found that the applicant had not been constructively dismissed by the second respondent.

[2] Leave having been earlier given to commence judicial review proceedings, I heard the substantive application on 25 June 2015, and delivered my decision with broad grounds on 14 July 2015, granting the order of *certiorari* to quash the Award. This judgment contains the full grounds for my decision.

Key Background Facts

[3] The reference under s. 20(3) of the Industrial Relations Act 1967 arose from the claim of constructive dismissal made by the applicant, subsequent to the rejection of his appeal against the decision of the second respondent to demote him following its finding of misconduct against the applicant.

[4] The applicant was during the material time a Manager at the second respondent institution. The second respondent is Institut Keselamatan dan Kesihatan Pekerja or National Institute of Occupational Safety and Health (NIOSH). It is a government owned agency which is primarily tasked with the promotion of occupational safety and health in Malaysia. Given the objective, the second respondent conducts regular occupational safety and health - related trainings around the country. On 28 April 2009, the applicant conducted a safety talk at a company known as Oriental Sheet Piling, on behalf of the second respondent, free of charge. The company however, on its own accord, presumably as a gesture of appreciation, gave to the applicant cash in the amount of RM400 and requested that a receipt be issued for its record. The applicant acceded and caused an unofficial receipt be issued for this purpose.

[5] Having considered the written explanation from the applicant in response to a show cause letter issued by the second respondent, the latter on 6 October 2011 conducted a domestic inquiry against the applicant on the following single charge:

> Mengeluarkan resit tidak sah kepada Syarikat Oriental Sheet Piling bertarikh 5 Mei 2009 untuk pembayaran Safety Talk pada 28 April 2009

[6] The domestic inquiry panel found the applicant guilty of the charge of having issued a receipt which was not in adherence to the financial procedures of the second respondent. The second respondent's disciplinary committee following its deliberations on 11 October 2011 and 8 November 2011 subsequently arrived at the decision to mete out the punishment of demotion against the applicant. The relevant passage in the letter of the second respondent to the applicant dated 30 November 2011 reads as follows:

> Berkuatkuasa 1 Disember 2011, tuan diturunkan pangkat dari jawatan Pengurus ke jawatan Eksekutif (Gred 15) dengan gaji pokok sebanyak RM4,723.96 sebulan. Selain dari yang dinyatakan di atas, lain-lain terma dan syarat perkhidmatan adalah tidak berubah.

[7] The applicant exercised his right to appeal to the second respondent twice *via* letters dated 7 December 2011 and 9 January 2012, both refused by the second respondent in its letters of 27 December 2011 and 16 January 2012, respectively. The applicant's attempt to challenge the decision of the second respondent at the Industrial Court was also not successful. The Industrial Court (the first respondent in these judicial review proceedings) in its Award, concluded that the punishment of demotion was neither excessive nor not proportionate to the misconduct, and that the punishment was therefore not in breach of the fundamental term of the contact of employment between the applicant and the second respondent. The applicant therefore failed to prove that he was constructively dismissed. Dissatisfied with this decision, the applicant instituted these judicial review proceedings for an order of *certiorari* to quash the Award.

The Applicant's Principal Submissions for Reliefs

[8] In his statement made pursuant to O. 53 r. 3(2) of the Rules of Court 2012, the applicant listed a number of grounds to support his application, which in the main, included the following:

(i) the first respondent had taken into account irrelevant considerations and failed to consider key facts;

(ii) the applicant never had a record of misconduct or poor performance;

(iii) his demotion to the position as an Executive was against the law as it involved a reduction in not one but two job grades of the applicant since the applicant had been a Senior Executive before his promotion to the position of a Manager;

(iv) the second respondent's disciplinary procedures did not specify demotion as a form of punishment, as opposed to reduction in grade or salary;

(v) the second respondent did not take into account the observation of the panel of domestic inquiry that the applicant acted honestly and there was no evidence of impropriety or misappropriation in the applicant's issuance of the unofficial receipt; and

(vi) the disciplinary committee which decided on the punishment was improperly constituted.

The Second Respondent's Submission

[9] The second respondent, on the other hand, maintained its key contentions, which I have summarised as follows:

(i) the applicant was rightfully punished following the proper conduct of an internal domestic inquiry process for a serious misconduct, affecting the integrity of a manager of the second respondent;

(ii) the second respondent never breached the contract of employment but it was the applicant who decided to cease employment;

(iii) the punishment was not excessive and was proportionate to the seriousness of the misconduct;

(iv) the second respondent continued to treat the applicant fairly even after meting out the punishment; and

(v) the applicant failed to establish that the second respondent had violated the fundamental terms of the contact of employment or that the applicant was constructively dismissed.

The Law on Judicial Review of Awards of Industrial Courts

[10] It is an entrenched principle of law that the burden of proving constructive dismissal lies on the claimant, who is the applicant in the instant case. The decision of the first respondent in the Award therefore meant that the applicant had failed to establish the key conditions to constitute constructive dismissal as stated by the English Court of Appeal in *Western Excavating (EEC) Ltd v. Sharp* [1978] 1 All ER 713 (and followed by the Federal Court in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298) primarily on whether the employer had violated the contract of employment and whether the terms which had been breached went to the foundation of the contract.

[11] The fundamental premise on which judicial review can provide a remedy had been enunciated by Lord Diplock in the leading case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. In administrative law, judicial review remedies can therefore be granted in respect of the following key categories against relevant public authorities:

(i) illegality: where the decision maker has not understood correctly the law that regulates his decision making power and given effect to it;

(ii) irrationality: where the decision is so outrageous in its defiance of logic or of accepted moral standards such that no sensible person who had applied his mind to the question to be decided could have arrived at it; and

(iii) procedural impropriety: where there is a failure by the decision-making body to observe procedural rules that are expressly laid down even where such failure does not involve any denial of natural justice.

[12] It is trite that judicial review is not concerned with the merits of the decision of the administrative bodies or tribunals for the function is not appellate, but that the focus is more on the legality of the decision making process. In the context of the decisions of Industrial Courts, the following passage from the decision of the Court of Appeal in *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501 is instructive:

> (2) In dealing with judicial review a judge should have the following principles, *inter alia*, at the forefront of his mind: (i) judicial review is not an appeal from the decision but a review of the manner in which the decision was made; (ii) the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable; (iii) the High Court, through judicial review, should not introduce technicalities of a court of law into the Industrial Court; this would certainly be so as s. 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience; (iv) the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act is to determine whether the misconduct or irregularities complained of by the management and forming the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal; (v) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in a court of law; (vi) the High Court will not interfere with findings of facts by the Industrial Court unless they are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on the facts; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court. (para 42)

[13] However, laws continue to evolve and develop, as laws inherently should in any respected democratic society. The experience of administrative law, in particular concerning judicial review in this country is no exception. Thus, the present position is that not only are the categories of grounds for judicial review not exhaustive (see the landmark Federal Court's decision in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147

("R Rama Chandran")), but the development of administrative law in Malaysia has also firmly established that whilst judicial review proceedings do not involve the exercise of an appellate function, the merits of the decisions of inferior tribunals can be reviewed in circumstances deemed to constitute an exception to the principle of the role being supervisory in nature (see the Federal Court's decision in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; [2004] 2 MLJ 288). More specifically and recently, the Federal Court in *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409 ("Norizan Bakar") reaffirmed the position with regard to decisions of the Industrial Court, as follows:

> [41] It is trite law that the decision of the Industrial Court is susceptible to judicial review on the grounds of "illegality", "irrationality", "procedural impropriety" and possibly "proportionality" under which the courts are clothed with powers to scrutinise the decision not only for process but also for substance. (See *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147). *Decided cases after Rama Chandran had clearly established that where the facts do not support the conclusion arrived at by the Industrial Court or the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, such findings are always amenable to iudicial review* (see *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79; *Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba* [1998] 3 CLJ 288; *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625 and *Ranjit Kaur a/p S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629).
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> (emphasis added)

[14] It is therefore well-established that public authorities and inferior courts or tribunals such as the Industrial Court must disregard irrelevant considerations. They must also ensure to take into account relevant considerations. Another recent decision of the Federal Court in the case of *Malaysia Airline System Bhd v. Wan Sa'adi Wan Mustafa* [2015] 1 CLJ 295, cited with approval an earlier ruling of the former Supreme Court in *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 with emphasis on the following observation by Jemuri Serjan SCJ (as he then was):

> Unreasonableness here, in our view, was used in the context of the broad sense of that term as expounded by Lord Greene MR in the case of *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] KB 223. 'Reasonableness' here embraces the various heads of *ultra vires* - such as misdirecting oneself in law, taking into account irrelevant considerations, or failing to take into account relevant considerations - which is now known as the *Wednesbury* principles ...

[15] The Federal Court in *Malaysia Airline System v. Wan Sa'adi Wan Mustafa* further affirmed that a decision could also be considered manifestly unreasonable if no body of persons could have reached it, and that in order to come to such conclusion there must be overwhelming evidence to support it.

[16] It is therefore on the basis of the available evidence before the Industrial Court that the High Court in any judicial review application should make the evaluation whether the decision of the first respondent had been arrived at by taking into account irrelevant considerations or ignoring relevant factors, or otherwise whether there had been any shortcomings that would tantamount to a defect in the *Wednesbury* unreasonableness sense.

Evaluation of the Grounds for Relief

Appropriateness of Punishment for Misconduct

[17] The issue of the appropriateness of the punishment imposed on the applicant, that of a demotion *vis-à-vis* the misconduct or wrongdoing in question was dealt with at length in the Award delivered by the first respondent. A careful reading of the same would demonstrate that a number of key aspects had been referred to by the first respondent in analysis of the Award. I shall make mention of the more significant of the same, as follows:

(i) the testimony of the applicant made it clear that the receipt in question was issued only because of the request by Oriental Sheet Piling. In his nine years serving the second respondent this was the first time a request was made. The applicant had also asked his staff to discuss with the Finance Division but never got round to do so. The issuance was clearly not intended to cheat or mislead, and it was also done openly;

(ii) although the RM400 specified in the receipt was not handed over to the second respondent, RM200 was deposited into a staff fund (Tabung NWS) and RM200 was placed in his office, and he claimed would be furnished to the second respondent if requested, and pending confirmation from the Finance Division. The receipt was issued by an accounts staff and the accompanying invoice by an executive. Both documents were issued under the authorisation of the applicant;

(iii) there was no clear guideline to deal with payment for the conduct of safety talk. A relevant set of guidelines was only issued on 22 August 2011 (which specifies that any monetary contribution received from clients after the rendering of services must be given to the Finance Division) subsequent to the incident involving the issuance of the receipt by the applicant on 5 May 2009;

(iv) it was not rebutted by the second respondent that payment for safety talk was practiced at other branches of the second respondent. In fact, Megat Kamaruddin bin Zainal Abidin, Senior Technician NIOSH who worked at the same Johor Bahru branch testified as COW-3 that twice he had accepted a token payment for conducting Safety Talk, in respect of which no receipts had been issued, because it was not requested for by the organisers;

(v) most importantly, despite finding a case of misconduct had been established, the panel of domestic inquiry made the following observations and comments, which I should re-produce in full given their considerable relevance:

> 5. Saranan
>
> Pihak pendakwa didapati telah berjaya membuktikan bahawa tertuduh bertanggungjawab sepenuhnya ke atas pengeluaran resit yang tidak sah kepada syarikat Oriental Sheet Piling. Walau bagaimanapun, ahli panel mendapati bahawa tertuduh telah berlaku jujur di dalam hal ini, yang mana beliau telah mengarahkan agar transaksi ini direkodkan di dalam buku log Tabung NWS yang menjadi Exhibit 2 pihak pendakwaan. Sehubungan itu, panel berpendapat bahawa tiada unsur penyelewengan di dalam transaksi tersebut. Di samping itu, panel juga mendapati bahawa kewujudan buku log serta Tabung NWS diketahui oleh kakitangan pejabat NIOSH Wilayah Selatan.
>
> Sehubungan dengan itu, panel membuat kesimpulan bahawa kes ini boleh dikiasifikasikan sebagai kes terpencil yang mana is merupakan satu-satunya kes yang berlaku di sepanjang tahun 2008 sehingga 2011. Namun yang demikian, panel ingin menyarankan agar garis panduan atau polisi yang lebih komprehensif dan telus perlu diwujudkan di dalam pengurusan wang sagu hati atau imbuhan yang seumpamanya, yang diterima dari pelanggan, bagi aktiviti penyebaran maklumat yang tidak dikenakan bayaran oleh NIOSH (sebagai contoh aktiviti Safety Talk atau pameran). Hal ini adalah sebagai salah satu usaha penambahbaikan yang wajar dipertimbangkan dengan mendalam oleh pihak pengurusan NIOSH.

In essence it was concluded by the panel of domestic inquiry that the applicant was not being dishonest, there was no element of impropriety, the existence of Tabung NWS was known to the staff, the case was isolated and that a comprehensive policy guidelines should be formulated by the second respondent to govern the treatment of gifts by customers for safety talks or similar events.

[18] Despite having referred to these considerations however, the first respondent found that the punishment was not disproportionate to the seriousness of the misconduct, and that the second respondent had not been in violation of the relevant contract of employment. Central to the reasoning made apparent in the Award was whether the second respondent could accept the fact that the action of the applicant had given the erroneous impression about the conduct and organisation of safety talk. In essence, this meant that whilst safety talk might be performed free of charge, an impression might have been given that payment may nevertheless be required or accepted. According to the Award, the second respondent was certainly entitled to expect that an employee of the applicant's seniority would not have issued a receipt in the manner that was done.

[19] In my assessment, the first respondent, in its Award, had given an excessive and undue emphasis on what it apparently considered to be the overriding consideration, that was an impression having been formed, *albeit* wrongfully, that payment may regardless be accepted, and the applicant's action in issuing the receipt was entirely unacceptable for that reason. The various factors stated earlier, which the first respondent had even referred to and for a few, also thoroughly analysed, in my view were therefore not sufficiently evaluated. Most fundamental is the fact, truly manifest as it was, that there were no guidelines or policies governing the treatment of gifts and payments received for the conduct of safety talk by employees of the second respondent at the material time. It would be most inequitable as well as being an affront to every established principles and rule of law for anyone to be faulted for a violation of a requirement which was non-existent at the material point in time. Concerns about the wrong impression given to external parties or that the second respondent had every right to expect the applicant not to have done the offending act would be secondary to what ought to be the primary consideration or threshold issue on the absence of a governing set of guidelines or protocol on the relevant matter.

[20] This is not to say that there was no breach on the part of the applicant. But the misconduct was strictly on account of the issuance of an unofficial and unauthorised receipt *per se*, as specified in the charge against the applicant as found by the panel of domestic inquiry, and not for having received the RM400. However, if the absence of any policy guidelines which caused the issuance of the unofficial receipt had been given sufficient judicial appreciation, I would have no hesitation in concluding that the punishment of demotion would not have been determined to be proportionate to the misconduct in question - that of the issuance of the unofficial company receipt, considering the circumstances for the issuance.

[21] It is not in dispute that payment of a nominal or token sum in favour of presenters generally for events such as talks, seminars and conferences is not uncommon and certainly not unheard of. The second respondent did not have any policy governing the matter. In fact, even the internal memorandum of the second respondent dated 11 June 2009 on "Prosedur Penerimaan Kutipan Wang Harian NIOSH" which was said to have been formulated to address the issue on payments to the second respondent (post the misconduct involving the applicant) did not specifically mention payments and gifts relating the services rendered in the form of conducting talks and seminars.

[22] Further, the Award did not take cognisance of Pekeliling Perbendaharaan Bil. 2 Tahun 2005 issued by Kerajaan Malaysia which dealt with the specific issue, as aptly titled, "Peraturan Mengenai Kadar-Kadar dan Syarat-Syarat Bayaran Saguhati kepada Pensyarah/Penceramah dan Facilitator Sambilan". This circular clearly provides for the validity for receipt of token gifts and payment or "saguhati" for government officers giving talks or lectures, subject to certain specified conditions. The circular was also extended to

local authorities and statutory bodies for their consideration for acceptance. Even if the circular was not adopted by the second respondent despite being an entity under the aegis of the Ministry of Human Resources, it is clear that receiving money as a gift by the presenter of a talk in the government service is a practice that is sanctioned and generally known. The second respondent's finding that the punishment commensurate with the misconduct primarily because the issuance of the receipt gave the impression as stated in the Award can be considered to be a reference to an irrelevant consideration. The relevant passage in the Award reads as follows:

> Ia membawa maksud sebenarnya Safety Talk tersebut diberikan secara percuma tetapi telah diberikan gambaran bahawa bayaran boleh diterima selepas Safety Talk diberikan. Jawatan pihak menuntut semasa kejadian menyebabkan syarikat mengharapkan Pihak Menuntut tidak sepatutnya mengeluarkan resit yang sedemikian. la sudah pasti tidak dapat diterima oleh Pihak Responden. Oleh yang demikian, Mahkamah berpendapat hukuman yang dikenakan oleh Pihak Responden kepada Pihak Menuntut adalah tidak keterlaluan dan bukannya sesuatu yang tidak setara dengan kesalahan yang dilakukan oleh Pihak Menuntut.

[23] Yet in the instant case, the client themselves asked for the receipt and there was no basis to suggest that they were under the misapprehension that payment was required or expected simply because a receipt was requested from the applicant. There was no evidence to suggest that money was given by them to the applicant because it was asked by the applicant. Considering the amount, it was very likely that oriental sheet piling decided to make payment on their own accord, perhaps thinking that such a move would be in conformity with the usual practice where a token gift or small payment be made to the presenters as a gesture of appreciation for what remained an event which was given for free by the second respondent. The act of requesting a receipt, which is understandable, for purposes of internal financial management, cannot, in my judgment be equated with the perceived concern that an impression had been given that the event was not for free on account of the payment of RM400. In my view, the same conclusion would hold even though the receipt and the invoice on the RM400 stated "fee for safety talk" as the reason for the payment. A practical, reasonable and business common sense like interpretation would favour one which suggests that whilst fully aware of the nature of the event which was given for free, the company nevertheless wanted to show its appreciation to the individual presenter by handing over a token sum of RM400 (for it would be unreasonable for any company to expect a mere RM400 to be charged for a talk if it was not organised for free), and that it would be logical to expect that the company wished to have some record of expenditure made, in the form of a receipt which was in this case indeed requested from the applicant. Having been effectively obliged to cause the issuance of the receipt, the statement made on the receipt that it was "fee for safety talk" (which can sensibly be deemed more for record purposes to satisfy the internal requirements of the company)

does not, to my mind, make the company, upon receipt thereof, changed its mind and start forming the misguided impression that the safety talk was in actuality not given for free. It is thus plain that the aspect of the issuance of the receipt cannot be considered in isolation without taking into account the surrounding circumstances and underlying reasons. And if these had been properly evaluated, especially considering the observations and suggestions made by the panel of domestic inquiry, in my view the finding of the first respondent on the appropriateness of the punishment of demotion (and the related question whether there was a fundamental breach of the contact of employment resulting in the constructive dismissal) would have been arrived at differently.

[24] It is true that the disciplinary committee, being the disciplinary authority in the second respondent is under the law not bound by the conclusions or observations made by the panel of domestic inquiry. However, the disciplinary committee must demonstrate the application of mind to all relevant factors including points of defence taken by the employee concerned (see Ganesh *Chandra Das v. South Bengal State Transport Corporation* 1993 Lab 1C 2574 [2576] (Cal): 1994 (68) FIR 707). There is however no documentary evidence to show that the disciplinary committee, despite accepting the panel of domestic inquiry's finding of misconduct against the applicant, had also taken into account the suggestions made by the latter or the reasons if it disagreed with the same. At the Industrial Court proceedings however, the Executive Secretary of the second respondent who was the Chairman of the relevant disciplinary committee gave evidence as COW-4 and simply stated that the disciplinary committee disagreed with the observations and suggestions of the panel of domestic Inquiry. Neither did the Award of the first respondent satisfactorily evaluate this shortcoming. In this context, there was insufficient judicial appreciation of the totality of evidence by the first respondent, as reflected in the Award, in the sense that when making the Award, the first respondent took irrelevant matters into considerations, such as concerning the supposed perception by oriental sheet piling of the event being chargeable by the second respondent, and failed to sufficiently take into account relevant considerations such as token gifts and payments to presenters being a generally accepted practice, and in the first place not strictly prohibited by the second respondent's internal policies and rules, at least during the material time. I am further fortified in arriving at this view after having fully examined the true nature of the punishment meted out against the applicant, which subject I shall now turn to.

Nature of Punishment

[25] The Award focused primarily on the punishment of demotion. The disciplinary procedure of the second respondent which listed in Lampiran 2 the types of disciplinary action that could be taken, specifies in item 5 "penurunan gred dan gaji". The letter from the second respondent to the

applicant dated 30 November 2011 states that the punishment for the guilty finding was "hukuman turun pangkat", and added the following pertinent paragraph:

> Tuan diturunkan pangkat dari jawatan Pengurus ke jawatan Eksekutif (Grade 15) dengan gaji pokok sebanyak RM4,723.96 sebulan

[26] A brief employment history of the applicant is apposite. He was first appointed as an Executive at Grade 13 on 17 February 2003. He was promoted to the position of Senior Executive (at Grade 14) with effect from 13 April 2005. On 1 March 2008, the applicant was promoted to the position of the Manager of Southern Region and placed at Grade 15. On 1 February 2009, he was confirmed in that same position and upgraded to Grade 16. His last drawn monthly salary has RM4,989.76.

[27] The applicant's contention that there were in fact three types of punishment meted out against him is not without basis. First there is the demotion (from Manager to Executive). Secondly, the reduction in grade (from Grade 16 to 15). Thirdly, a reduction in salary (from RM4,989.76 to RM4,723.96). Based on industrial relations jurisprudence, such form of punishment is harsh, excessive and unlawful. In *Kesatuan Pencantuman Pekerja-Pekerja Tenaga Nasional Bhd v. Tenaga Nasional Bhd* [2013] 1 ILR 221, the Industrial Court held that the decision to demote to a lower grade and deny any increment for five years meant that the aggrieved employee was punished twice. In the case of *MEC Forwarding System Sdn Bhd v. Ramachandran G. Krishnan* [2007] 1 ILR 71 it was held that the punishment of reduction in rank and in salary constituted a fundamental breach of the contact of employment which was sufficiently serious to justify the aggrieved employee leaving his employment. This aspect of the imposition of punishment which is erroneous in law was not mentioned in the Award of the first respondent given its focus on demotion only.

[28] Further, if downgrade and demotion are to be distinguished, which they ought rightfully to be, since position/designation may not necessarily be tied to specific job grades, it would be readily appreciated that Lampiran 2 to the disciplinary procedures does not list demotion as a form of punishment. This is yet another facet of a compendium of errors of law afflicting the decision against the applicant in the instant case. And neither is this issue referred to, let alone addressed in the Award. The following passage from the decision of the Industrial Court in *Syarikat Permodalan Kebangsaan Bhd v. Mohamed Johari Abdul Rahman* [2004] 2 ILR 803 is most instructive in illustrating the abovementioned point:

> That demotion has serious consequences upon a workman cannot be denied. And more serious is a demotion with a reduction in salary as in the instant case. The claimant's salary was reduced by about 28% from RM7,500 to RM5,418.75. There was a drastic change to his earning capacity through his contract of employment upon which his livelihood depended. And to a right of livelihood the claimant is entitled to, if not

directly by art. 5(1) of the Federal Constitution, definitely by way of the authority of Gopal Sri Ram JCA speaking in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Another Appeal* [1997] 1 CLJ 665.

The court therefore holds that the company having no right to exercise demotion as a punishment upon the claimant had not merely breached a term of the claimant's contract of employment but had essentially offered him a new revised contract of employment which he had a choice to accept or reject. If I cherished any doubts on the correctness of this, I am comforted by the words of Gopal Sri Ram JCA at pp. 148 of *Ang Beng Teik v. Pan Global Textile Bhd Penang* [1996] 4 CLJ 313:

> Take the case of demotion. A workman in a particular case who suffers a demotion may consider himself to have been dismissed without just cause or excuse. He may treat the demotion as a dismissal.

[29] The evidence in the instant case quite clearly shows the distinction between downgrade and demotion, at least as practised in the institution of the second respondent. The applicant was a Manager and at Job Grade 16 prior to the punishment being made effective, and following which he was re-designated and demoted in position to that of an Executive, at Job Grade 15. Yet there was uncontroverted affidavit evidence of the Executive Secretary of the second respondent (COW-4) that there were other Managers at Job Grade 15 at the point in time of the demotion. This must mean that the position of Manager and Job Grade 15 are not necessarily fixed and tied together. This also means that a demotion may not necessarily result in a reduction in Job Grade and *vice versa*. Yet in this case, the second respondent chose to punish the applicant thrice, not merely by reducing his Job Grade, but also demoting his position, in addition to reducing his salary. Therefore, the averment by the Executive Secretary of the second respondent which denied that the applicant was demoted twice on the premise that the minimum grade for the position of a Manager was Job Grade 16, on evidence, cannot be accepted. This is especially considering the submission of the second respondent which referred to a company memorandum apparently confirming Job Grade 16 being the minimum grade for a Manager to be somewhat disingenuous given that the memorandum was dated 13 December 2011, about two weeks after the demotion of the applicant.

[30] Moreover, the fact that the applicant was in the position of Senior Executive prior to being promoted to that of a Manager, the evidence of which is similarly unchallenged (as confirmed by the Executive Secretary in his evidence as COW-4), was however not referred to at all in the Award written by the first respondent. The Award did not therefore consider the principle of law that the reduction in position must not be lower than from which the employee was last promoted (see the Indian Supreme Court cases of *Nyadar Singh v. Union of India & others* (AIR 1988 Supreme Court 1979 - Civil Appeal No 3003 of 1988) and *Hussain Sasansaheb Kaladgi v. State of*

Maharashtra (AIR 1987 Supreme Court 1627 - Civil Appeal No 835 of 1973)). Yet, as has been stated earlier, when the second respondent meted out the punishment on 30 November 2011, the applicant was reverted to the position which the applicant held when he first commenced employment in 2003, disregarding the fact that he had subsequently since joining, been promoted to the position of a Senior Executive on 13 April 2005 prior to being made a Manager.

[31] There is additionally another defect which taints the legality of the Award as it offends the rule that an employee can only lawfully be demoted to a rank within the same category of service. A demotion from the position of a Manager to an Executive therefore tantamount to an error of law. This error of law although referred to, was nevertheless similarly not given sufficient weight in the Award given by the first respondent. The following parts of the decision of the Industrial Court in the case of *Nippon Paint (M) Sdn Bhd v. Abd Rahim b Md Ibrahim* [2008] 2 LNS 0654 (Award No 654 Tahun 2008) (a case referred to in the Award, but on a different point) are of relevance in clarifying the position in law on the subject:

> 11. Setelah menimbangkan fakta-fakta dan penghujahan peguam-peguam, Mahkamah mendapati bahawa memang Pihak Majikan mempunyai kuasa menurunkan pangkat mana-mana pekerja sebagai salah satu hukuman jika didapati membuat salah laku. Walau bagaimanapun, Mahkamah berpendapat bahawa kuasa sedemikian hanya boleh terpakai dalam situasi di mana seseorang pekerja itu diturunkan pangkat dalam kategori perkhidmatannya. Misalnya seorang pengurus kanan boleh diturunkan pangkat ke jawatan pengurus yang lebih junior, atau seorang eksekutif tahap 1 boleh diturunkan pangkat ke jawatan eksekutif tahap 2, atau bagi kategori staff biasa seseorang sales supervisor misalnya boleh diturunkan pangkat menjadi sales staff biasa.
>
> 12. Dalam kes sekarang tidak dipertikaikan bahawa Pihak Menuntut memegang berbagai jawatan dalam syarikat dalam kategori eksekutif Kontrak perkhidmatannya meletakkan dia di kategori eksekutif yang berbeza dari kategori staf biasa. Kesan yang berlaku mengikut keputusan Pihak Majikan ialah mengubah keseluruhan kontrak perkhidmatan yang wujud di antara Pihak Majikan dengan Pihak Menuntut.
>
> 13. Pemecahan kontrak begini adalah amat serius kerana dalam berbuat demikian Pihak Majikan tidak lagi mahu terikat dengan kontrak perkhidmatan yang mengikat perhubungan di antara Pihak Majikan dengan Pihak Menuntut. Pada hemat Mahkamah apabila Pihak Majikan tidak berganjak dari keputusan menurunkan pangkat Pihak Menuntut, Pihak Majikan telah cuba mengubah keseluruhan terma dan syarat perkhidmatan yang wujud di antara kedua-dua pihak. Ianya adalah fundamental breach of contract of employment yang membenarkan Pihak Menuntut membuat dakwaan yang dia telah dibuang kerja secara constructive dismissal.

14. Fakta kes ini adalah memenuhi syarat-syarat tuntutan constructive dismissal seperti yang diputuskan dalam kes *Western Excavation (ECC) Ltd. v. Sharp* [1978] IRLR 27. Prinsip ini telah digunapakai dalam kes *Wong Chee Hong v. Cathay Organisation (M)* [1988] 1 CLJ 298.

15. Berdasarkan alasan-alasan di atas, Mahkamah memutuskan bahawa tuntutan Pihak Menuntut yang dia telah dibuang kerja secara constructive dismissal adalah berasas. Oleh yang demikian Mahkamah membenarkan tuntutan bagi yang dia berhak perolehi di bawah undang-undang.

[32] Furthermore, the second respondent contended that notwithstanding the punishment reducing the position and Job Grade of the applicant, he continued to be fairly treated, among others, on account of the fact that he was asked in a subsequent letter dated 1 December 2011 to continue assuming the responsibilities as the Manager for the Southern Region, in the following terms:

Adalah dimaklumkan, pihak Pengurusan telah memutuskan bahawa pihak tuan masih lagi dipertanggungjawabkan ke atas segala urusan operasi dan pentadbiran di Pejabat Wilayah Selatan (Johor Bahru dan Melaka) sehingga diberitahu kelak.

In my view, far from supporting, let alone vindicating the course of action taken by the second respondent in punishing the applicant, such instruction did more to demonstrate that the same was nothing but tantamount to a form of an unfair labour practice. The reduction to the position of an Executive placed the applicant equal to five other Executives serving the Southern Region at the material time. Yet he was instructed to continue performing the managerial duties despite the demotion, and expected to continue to command the respect of the rest, when the fact of his demotion must have been known to others. The applicant's contention that this amounted to untold embarassment, if not a humiliation to him is in my view not to devoid of merit. Further, the second respondent also submitted that the applicant was even given an increment of salary despite the punishment. However, evidence showed that the letter on the purported increase was dated 26 January 2012 which is glaringly a date subsequent to the applicant leaving employment by reason of citing constructive dismissal on 18 January 2012.

[33] There is yet another aspect which appeared not to have been satisfactorily rebutted by the second respondent, and not referred to in the Award of the first respondent. Clause 21.2 of the disciplinary procedure of the second respondent provided that the disciplinary committee was to be constituted by three members; specifically the Executive Secretary, the General Manager and one of the Managers. However, what actually transpired was that whilst the Executive Secretary of the second respondent became the Chairman of the disciplinary committee, the two other members were neither the General Manager nor Manager of the second respondent but instead two of their directors of the board of the institution. The applicant

thus contended that the decision of an improperly constituted disciplinary committee is not binding on him. This complaint however did not elicit any riposte by the second respondent nor merit any mention in the Award given by the first respondent.

Overall Assessment

[34] The adjudication function of the Industrial Court was described in the case of *Hotel Malaya Sdn Bhd & Anor v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1982] CLJ 460; [1982] CLJ (Rep) 124; [1982] 2 MLJ 237 to involve an investigation of the facts, an analysis of the facts, findings of facts and the application of the law to those findings. Having considered the nature of the misconduct and that of the punishment and taking into account the weight of the other aspects, both evidential as well as on principles of law which as highlighted earlier in this judgment, did not appear to have been given sufficient judicial assessment, I am of the view that the Award of the first respondent had been tainted with illegality in the *Wednesbury* unreasonableness sense whereby the first respondent had failed to take into account relevant considerations, in a manner not dissimilar to the defect found in the case of *Norizan Bakar* as referred to above. Additionally, in the case of *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 CLJ 541, the Federal Court held that the Industrial Court failed to take into consideration the fact that the employee was gainfully employed elsewhere after his dismissal when evaluating back wages.

[35] The relevant considerations in the instant case such as the seriousness of the misconduct in the absence of relevant governing policy, the nature of the disciplinary action involving three forms of punishments, the very legality of demotion as a punishment, the "double demotion" as well as a demotion to a position different from the applicant's category of service as a Manager all also constitute errors of law that could and should attract supervisory intervention in the form of a judicial review. Decisions of the Industrial Court are similarly amenable to judicial review when it acted on an erroneous basis of facts. For instance, in the case of *Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77; [2000] 3 MLJ 714, the Court of Appeal ruled that an incorrect inference from proved or admitted fact constituted an error of law. In *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79, the Court of Appeal held that the Industrial Court's finding of fact was unsupported by evidence. The situation in the instant case may thus be said to invoke the established legal principle that finding of facts by a tribunal will not be disturbed unless it can be shown that the totality of evidence was such that no reasonable tribunal could here disregarded it (see *South East Asia Fire Bricks Sdn Bhd v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 1 LNS 71; [1980] 2 MLJ 165). Failure to consider relevant matters is an "illegality" under the concept of *Wednesbury* unreasonableness. The concept of an error

of law also embodies substantially similar ultra rises permutations, if not of even wider application. *Halsbury's Laws of Malaysia* vol. 9 para. [160.076] describes the same as follows:

> Errors of law include misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof.

[36] This is not to say that the Award of the first respondent represents a decision which is irrational or unreasonable in the sense that it is "so outrageous in its defiance of logic or of any acceptable moral standards that no sensible person who had applied his mind to the question to decide could have arrived at it" (see *Bromley London Borough Council v. Greater London Council & Anor* [1983] 1 AC 768). But it is decidedly a decision which is flawed by reason of illegality, in that the first respondent had failed to do direct, its mind to all relevant considerations it should have taken into account. It had fallen into an error of law in having taken the approach in arriving at the decision as it did, and at the same time, and no less fundamentally, the decision further offended the rule on proportionality. Justice, equity and fair play demand that punishment must always be commensurate with the gravity of the offences charged (see *Rama Kant Misra v. State of Uttar Pradesh* 1982 Lab 1C 1970, 1792 (SC)). As mentioned earlier in this judgment, the recent decision of the Federal Court in *Norizan Bakar* had reaffirmed that awards of Industrial Court may be challenged in judicial review proceedings for among others, proportionality and for that purpose the reviewing court has the jurisdiction to examine the substance of the decision. Raus Sharif PCA, delivering the judgment of the Federal Court states thus:

> [36] Thus, in reference to the questions posed to us, we are of the view that the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also to decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the award under s. 20(3) of the IRA. We are further of the view that the Industrial Court in exercising the aforesaid functions can rely on its powers under s. 30(5) of the IRA based on the principle of equity, good conscience and substantial merits of the case.
>
> [39] Based on the above, it is clear that the Industrial Court can go on to decide on the relief to be granted by taking into account of contributory misconduct and as such we are of the view that the doctrine of proportionality of punishment is already inbuilt into the IRA. Thus, the

A Industrial Court can substitute its own view as to what is the appropriate penalty for the employee's misconduct, for the view of the employer concerned.

[37] It bears repetition that in my judgment, a thorough and objective assessment of the evidence available before the first respondent, particularly
B focusing on the nature and background of the misconduct as against the nature and type of punishment meted against the applicant could, I am firmly of the view, have led the first respondent, had it taken into account those matters to the requisite degree that fulfils the threshold for a sufficient judicial appreciation of evidence, to reach the conclusion that the punishment was
C palpably not proportionate to the misconduct in question, thus occasioning a fundamental breach of the contract of employment between the parties, and justifying the applicant's claim for constructive dismissal within the principles established by the Supreme Court in *Wong Chee Hong v. Cathay Organisation (Malaysia) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298.
D In other words, the applicant had successfully proven its claim, on a balance of probabilities, that by meting out the punishment which is flawed with illegality and a battery of errors of law, the second respondent had breached the very foundation of the contract of employment with the applicant, which justified the latter leaving employment as he did for reason of the breach. It was also clear, for completeness, that the second respondent could not prove
E that the dismissal was for just cause or excuse. The Award could thus be characterized as one which is contrary to the overriding conceptual jurisprudence of industrial relations law which promotes the doctrine of equity, good conscience and substantial merits of the case, in adherence to s. 30(5) of the Industrial Relation Act 1967.

F **[38]** In my view, following *Norizan Bakar*, it ought to be settled law that proportionality be firmly established as a category or one of the bases that could attract the public law remedies of judicial review in this country, and that this not be confined only to the jurisprudence of industrial relations law, not least because the proportionality principle is, as cases such as *Tan Tek*
G *Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261 more than amply demonstrate, derives its origin in no less than the Federal Constitution. Gopal Sri Ram JCA (as he then was) in that case stated the following:

H ... the requirement of fairness which is the essence of Article 8(1) when read together with Article 5(1) goes to ensure not only that a fair procedure is adopted in each case based on its own facts, but also that a fair and just punishment is imposed according to the facts of a particular case.

[39] It is noteworthy that the principle of proportionality is of fundamental
I importance in the application of the European Convention on Human Rights. The European Court on Human Rights found the principle particularly relevant where the Convention permits restrictions upon a right as in

arts. 8 to 11 (mainly on rights to private and family life, freedom of thought, freedom of expression and freedom of peaceful assembly) where any restrictions which a Member State places on these rights had been ruled "must be proportionate to the legitimate aim pursued" (see *Handyside v. UK, Series A, No. 24* [1976] 1 EHRR 737).

Conclusion

[40] In conclusion, I therefore find that the decision of the first respondent in Award No. 492 of 2014 dated 8 April 2014 for Case No. 16-4-1130-2012 to be defective for being affected by illegality, in the *Wednesbury* unreasonableness sense in that the first respondent failed to have taken into account relevant considerations (including particularly those involving errors of law) as well as to be flawed for having ruled that the punishment imposed by the second respondent as being proportionate to the misconduct found by its panel of domestic inquiry. Another tribunal, similarly circumstanced would, in my view, have found the applicant having proven his case on a balance of probabilities that the second respondent had been guilty of a breach going to the root of the relevant contract of employment that ought to have justified the claim of constructive dismissal by the applicant, and that the second respondent had failed to establish that the dismissal was for just cause or excuse. Accordingly, I hereby rule that an order of *certiorari* be issued to quash the said Award and costs of RM3,000 be awarded to the applicant.